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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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LEEWARD CONSTRUCTION COMPANY, LTD.

Plaintiff

v. 12 CV 6280 (LAK)

AMERICAN UNIVERSITY OF ANTIGUA - COLLEGE OF MEDICINE

Respondent

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New York, N.Y.
June 28, 2013
4:30 p.m.

Before:

HON. LEWIS A. KAPLAN

District Judge

APPEARANCES

LEWIS & GREER PC
510 Haight Avenue, P. O. Box 2990
Poughkeepsie NY 12603
Attorney for Petitioner Leeward
VERONICA A. McMILLAN

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Attorney for Respondent A.U.A.
JONATHAN S. JEMISON

(In open court)

THE COURT: Good afternoon, folks.

MS. McMILLAN: Good afternoon, your Honor.

MR. JEMISON: Good afternoon, your Honor.

THE COURT: Ms. McMillan, I appreciate that you've come from Poughkeepsie. There is a TRO requested. I don't normally grant those without having the other side heard. Sorry you had to take the train ride, but your alternative would have been to consent to the relief.

MS. McMILLAN: I appreciate the Court's patience in getting here this afternoon.

THE COURT: It's all right. Judges don't like Friday afternoons TROs any more than litigants do.

Mr. Jemison?

MR. JEMISON: Yes, your Honor.

THE COURT: Use the podium, please.

MR. JEMISON: I will.

THE COURT: Go ahead.

MR. JEMISON: Thank you, your Honor. So this is our application, and the reason for our application, I believe, is quite simple and straightforward. As you know, this Court entered a judgment against my client, American University of Antigua, and my clients reached out to the counsel for Leeward, and in light of a second separate arbitration pending between the parties and other considerations, including, I believe, an

understanding that Leeward itself, an Antigua entity, had no other assets other than its judgments, and that my client had claims that exceeded the amount of the judgments, I had offered -- I had indicated my intent to come to this court two months ago to seek a stay of enforcement and offered a compromise which Leeward accepted.

We spent the next several weeks primarily with Ms. McMillan negotiating a stay in which Leeward would stay enforcement of this Court's judgment pending the resolution of the second arbitration, and my client would obtain a bond in the full amount of the judgment plus interest for two years plus the amount of Leeward's claim in the second arbitration and interest on that for two years plus an agreement to supplement that bond if the passage of time warranted because the security wouldn't be sufficient to cover fully Leeward's judgments or claims, and my client also had agreed to waive its right to appeal this Court's judgment.

The parties, after negotiating the agreement, ultimately executed the agreement, exchanged the fully executed document, and two days after full execution, Ms. McMillan's partner emailed me and said, "I think we're going to renege. We believe that you withheld information, and we're going to put the agreement on hold," notwithstanding the fact that the parties had fully executed that agreement already. And because of that, the second part of the consideration, which was the

withdrawal of our appeal, we held off on for no other reason than to protect our appellate rights. We obviously would fully -- we would immediately withdraw that appeal upon an order of a stay from this Court in connection with our motion.

We've also, as I say in my papers, obtained the bond that we promised to obtain. We actually had to put up the entire amount of the judgment to the bonding company plus the premium. So all the money that Leeward could possibly be owed at this moment or two years from now is already fully paid to a surety company fully securing their judgment. It's what we bargained for, and we fully expect that Leeward would comply.

As you know, Leeward has taken a different view, and despite the conversations that I've had with them indicating that their position was without merit, primarily their position was that they did not know AUA was going to try to amend the claims pending in the arbitration to assert construction defect claims notwithstanding the fact that AUA had --

THE COURT: Run that last point by me again.

MR. JEMISON: Sure. The reason proffered by McMillan and her partner, Mr. Greer, as to why they deemed our agreement to be null and void was that they said they learned for the first time the day after they signed the agreement that AUA was intending to amend their claims pending in the arbitration to assert construction defect claims. And the documents that we attached, the Sclafani Declaration, Exhibits 8 and 9,

conclusively demonstrate that AUA made Leeward well aware in February, two months before this Court's judgment was even entered, that AUA was intending to assert construction defect claims in that arbitration; that it was looking for more time from the arbitrators in order to get its ducks in a row.

Leeward responded in kind, basically arguing that it would be improper for AUA to assert those claims in that form. That being the case, to say that they learned for the first time after they signed the agreement that AUA was going to pursue those claims in the arbitration is just flatly contradicted by the documents, and so it's our position that Leeward --

THE COURT: The first of the documents -- I see it's copied to Mr. Greer.

MR. JEMISON: Yes, correct, to the arbitrators, a copy to Mr. Greer. In that email it says quite clearly what they intend to do.

The second document is a letter written by Ms. McMillan on February 19 specifically identifying the construction defect claims and objecting to AUA's right to assert it in the second arbitration.

AUA to date has still not formally asserted those claims. It's in the process of trying to do so. It let the arbitrators know what those claims were last week and itemized them because they were asked to, but the claim has been

submitted to an architect for a ruling, and the architect, as far as I know, the last time I talked to my client today, has not yet issued a ruling on those claims. Those were, I think, just submitted late last week. So it has not taken the next step to formally amend their counterclaims in the arbitration,

But what I'm talking about, you know, Mr. Greer in his initial email to me on February 15 where he indicated that he was now reneging or considering reneging on the agreement that the parties had just entered for a stay because he had heard for the first time the day before that AUA was going to pursue construction defect claims, and, again, I submit that that is just inaccurate. Be that as it may -- sorry, go ahead.

THE COURT: You are asking me, as I understand it, for a stay on two different grounds: One ground is that you want me to make a determination either today or in the future in this case that you have a legally effective agreement --

MR. JEMISON: That's right.

THE COURT: -- for the stay. And the second ground is you want it under Rule 62 pending appeal in this case. Is that right?

MR. JEMISON: Well, I'll clarify. The second ground is -- I'm not seeking an appeal bond. What I am seeking is the exercise of this Court's inherent powers to grant the stay akin to a Rule 62 stay. I cited the *Katz v. Feinberg* case as an example where that has been done by the Southern District in

somewhat similar factual circumstances.

I certainly could, if I wanted to, post an appeal bond. I haven't done that because I've agreed to waive my right to appeal as consideration for the stay that I did agree to -- that my client did agree to. An appeal bond, if my client were to seek one, it would get us -- I guess would get us a stay, but, you know, that's not what we're looking for. I don't know how long the appeal may take, and, frankly, as I said, my client already agreed to withdraw that --

THE COURT: Don't I have authority under Rule 62 to grant a stay pending appeal on whatever security, if any, I think appropriate?

MR. JEMISON: You do. Again, of course that appeal -- that stay would be effective so long as the appeal remains prosecuted.

THE COURT: Right.

MR. JEMISON: Once the appeal is either withdrawn or prosecuted one way or the other -- and from our perspective and the reason why we sought an agreement for a different kind of bond, a bond that would be -- and a stay that would remain in place through the second arbitration, is that the second arbitration may last longer than the appeal.

THE COURT: Which part of Rule 62 gives me the authority to grant a stay pending appeal without security or with security in a form other than a supersedeas bond? I

remember that there are cases that have done that, but I'm not locating it quickly in the rule. Do you know where it is?

MR. JEMISON: Well, I believe the rule states that in exceptional circumstances the Court does not have to require the posting of a supersedeas bond depending on the circumstances.

THE COURT: Which part of the rule do you say says that?

MR. JEMISON: Again, my application, while it is under Rule 62, it's not per se under Rule 62, so I don't have the answer to your question in front of me. I don't have the rule in front of me.

THE COURT: So the answer is we don't know; is that the answer?

MR. JEMISON: The answer is -- yes. But what I can say and what I, again, put forward in my papers was I cited to a case *Katz v. Feinberg* in which the Southern District --

THE COURT: You would essentially like specific performance --

MR. JEMISON: Of my agreement.

THE COURT: -- of your agreement.

MR. JEMISON: Or, alternatively, a stay in light of the fact that Leeward is insolvent. There is another arbitration pending between the parties.

THE COURT: Here is the problem. Judgment has been

entered in this case, right?

MR. JEMISON: Right.

THE COURT: The case is over, right?

MR. JEMISON: Right.

THE COURT: And my memory is that under the *Kokkonen* case, a district court has no authority to enforce a settlement agreement, and, by logical extension, any other agreement between the parties, even an agreement of settling a case that previously was before it unless there has been an express reservation of jurisdiction to enforce a settlement. I don't remember there being such in this case even assuming what we were talking about was a settlement, which I'm not so sure about.

So, to the extent you are effectively asking me to grant specific performance of the stay agreement, or whatever you call it, I'm not sure I have any power to do that. That is why I am focused on Rule 62. What can you tell me about those problems?

MR. JEMISON: Well, do you want me to talk about the problem about your authority to issue a stay or about Rule 62? Which question are you asking me?

THE COURT: I thought it was quite clear, but I am asking whether I have any jurisdiction at all to do anything at all unless it's under Rule 62.

MR. JEMISON: It is my understanding -- and, again,

I'll go back to the case that I cited in my papers, *Katz v. Feinberg* where under the Court had cited the inherent powers of the all writs act. In that case, what had happened was that judgment was entered, and an application was made to stay the judgment, not because of an appeal or a supersedeas bond being posted, but because there was a second arbitration pending. In fact, in that instance, the party seeking a stay wasn't a party to the arbitration, but that other arbitration triggered a right of setoff that he would lose potentially because the party from which it set off its judgment was arguably judgment-proof, and he would have no way of collecting ultimately the benefit of his setoff. What he had asked for was for the Court to stay execution and enforcement of the judgment that it had entered pending the resolution of that second arbitration.

The Court in its opinion says that we understand there's no specific rule -- and this is not a pure Rule 62 issue, it doesn't fall within any of the rules of the Federal Rules of Civil Procedure -- but it is akin to a Rule 62 motion. We are going to apply those standards and look at it from that lens, and then they concluded that if the arbitration went a certain way, the party seeking the stay would have a right to setoff, and it felt that under the circumstances that right could be deemed eradicated if it didn't issue a stay, and it ordered the party to obtain a bond pending the resolution of

that arbitration to secure the judgment which it did.

THE COURT: How is that relief in aid of my jurisdiction in this case?

MR. JEMISON: That relief happened in the same procedural posture that this case is in.

THE COURT: That's not an answer to the question. The all writs act gives me the authority to issue, and I quote: "All writs necessary or appropriate in aid of my jurisdiction." How is this stay you're asking for in any respect in aid of my jurisdiction, however fair and equitable it might seem to me?

MR. JEMISON: This Court issued its judgment --

THE COURT: Right.

MR. JEMISON: -- and AUA is seeking relief from that judgment under the circumstances via a stay because of the fact that it has claims against Leeward. Leeward's insolvent and Leeward agreed under the stay agreement to provide us with that stay, and absent a stay, my client may never be able to collect on its claims should it prevail. Leeward agreed to the contract. My client has posted a bond, albeit not a supersedeas bond --

THE COURT: I got all that. I got all that. Anything else?

MR. JEMISON: No, your Honor. Other than that, I will rely on our papers.

THE COURT: OK. Ms. McMillan?

MS. McMILLAN: Good afternoon, your Honor.

THE COURT: Good afternoon.

MS. McMILLAN: We just received the papers this morning so my argument may not be as good as it would otherwise be with some preparation, but I would initially say, your Honor, that the application before the Court this afternoon for a temporary restraining order should be denied because there is no immediate irreparable harm to the AUA, as the Court has aptly pointed out.

THE COURT: Now, wait a minute. You have a writ of execution which means that you can go grab their property without notice any minute, right?

MS. McMILLAN: Except that, as your Honor aptly pointed out, they could post a supersedeas bond and stay the enforcement of the judgment pending the outcome of the appeal.

THE COURT: Yes, but they don't have an obligation to do that. What you have now is court process that allows you to grab their property. Are you telling me you have no intention of doing that?

MS. McMILLAN: No, I'm not telling you that, your Honor.

THE COURT: So, obviously you do have an intention of doing that, or at least there's a credible threat that you do. In light of what has been said about the status of Leeward, and it seems to me that there is a manifest threat that if you were

to do that, the property would be dissipated and that would be the end of it. It would be irreparable.

MS. McMILLAN: Well, your Honor, like you were previously indicating to Mr. Jemison, they could post the supersedeas bond, and it would be secured during the pendency of the appeal. In addition to that --

THE COURT: We just covered that ground. Is there something else you want to say about that?

MS. McMILLAN: Well, in terms of the stay agreement, I think it would be unfair in terms of the Court enforcing that agreement because there was a misrepresentation between the parties with regards --

THE COURT: And what was it?

MS. McMILLAN: The AUA initially earlier this year when the second arbitration was commenced asked for an extension of time to respond to the counterclaim for defective work. At that time, I opposed the request for extension saying that any of the claims would be barred under the doctrine of res judicata. After that, we didn't hear anything further with regard to defective work claims. The only thing that the AUA --

THE COURT: So the fraud was that they said we're going to sue you for defective work. You said it would be a bad claim. And so knowing full well that their stated intention was to sue you, they defrauded you?

MS. McMILLAN: Well, no, your Honor, because --

THE COURT: That's a stretch.

MS. McMILLAN: It went a little further than that. As Mr. Jemison indicated, we had a negotiation with regard to a stay agreement. The entire length of that negotiation, and indeed the document itself, only refers to the ABST claim. There was never any indication after that initial letter from Mr. Sclafani which then he supplemented on --

THE COURT: Let me ask you this: Having already told you that they were contemplating defective work claims, what is the source of a legal duty to tell you again, and again, and again?

MS. McMILLAN: They indicated in the stay agreement that the crux of their claim was the ABST claim that we already had in front of us as part of the arbitration.

THE COURT: Possibly you could direct me to that.

MS. McMILLAN: Sure. The time to amend the claim within the arbitration had passed --

THE COURT: Ms. McMillan, please direct me to where they said in the stay agreement that it was the ABST claim.

MS. McMILLAN: It's the second to last "whereas" clause: "Whereas Leeward has asserted a claim in the amount of U.S. $30,000 and change in the second arbitration. The AUA has asserted a counterclaim against Leeward in the amount" --

THE COURT: And where does it say, "whereas AUA has

previously advised you that they are contemplating defective work claims but now represents that they are no longer going to do that"?

MS. McMILLAN: It was the totality of the circumstances.

THE COURT: Right. I think that's probably a dead loser. OK? Just to be frank about this. You are in an adversary negotiation with your judgment creditor about a stay, and the judgment creditor has already told you -- I guess they're the judgment debtor, excuse me -- has already told you he's going to make defective work claims against you, and you are somehow trying to conjure out of this a duty to remind you over and over again. Well, I don't think it flies. Certainly for the purpose of this afternoon it doesn't fly.

MS. McMILLAN: Very good, your Honor.

With regard to the defective work claims and the fact that they're further evidence of the AUA just dragging this entire proceeding out as long as possible, I would note that we do have some information now with regard to the defective work claims. They essentially almost tripled the amount that they are demanding in the arbitration, and it will push out the second arbitration for, you know, probably two to three years.

THE COURT: Life is like that. You're fully secured, right?

MS. McMILLAN: Well, with the exception that this kind

of came out of left field, and we do believe that it was a misrepresentation on their part. I understand the Court doesn't agree, but that was our position because we no sooner signed this agreement that only indicated the ABST claim, and several days later there was a subsequent proceeding where all of a sudden the defective work claim was --

THE COURT: There's another view of this, and the other view of this is that you were on notice, and if your office, or whoever negotiated this, did not take the care to button down what the other counterclaims might be, it's your own fault. That is another view of this.

MS. McMILLAN: Well taken, your Honor.

THE COURT: So, now why isn't the right thing to do here, since you are fully secured for this in some manner or form, to be stayed, the execution?

MS. McMILLAN: Well, I would agree with the Court that staying the execution during the pendency of the appeal would be appropriate. The appeal right now is scheduled to go at least through the fall. I'm not sure what the Second Circuit's decision time frame is, but we could be looking at the beginning of next year before there is a decision on --

THE COURT: In the meantime, you are going to have a collateral litigation about your claim that the stay agreement was induced by fraud, which will certainly lead to motion practice, which my best guess is you will lose on; but if you

don't lose on the motion practice, then you will have a trial on that, and you will spend a whole bunch more money, whether before this Court or some other court, and at the end of the day you are going to, in all likelihood, wind up with a poorer client and no faster. Isn't that really true? Is that an incorrect analysis on my part?

MS. McMILLAN: No doubt, your Honor, that the amount of fees that have already been expended in litigating this claim have been substantial.

THE COURT: So why don't you do the right thing and simply go back to the stay agreement and go forward with the deal that you made --

MS. McMILLAN: The short --

THE COURT: -- and avoid the appeal to the Second Circuit in the bargain? It's not like you gave them the stay for nothing.

MS. McMILLAN: The short answer, your Honor, is that we would have to consult with our client about that and get their permission to do that before we do. But if that is the Court's direction, we would certainly take that.

THE COURT: It's not my direction. I am trying to do something practical here. I'm perfectly prepared to decide this motion this afternoon, and you can fight it over till the devil comes out on ice skates. I mean, it's that simple if that's what you and your client want to do and they and their

client wants to do. We're just the referees. But it doesn't seem to me to make a whole lot of sense.

Well, I'm going to grant a stay. I take it you don't have any quarrel with the proposition that I have the authority to do that under Rule 62 on such terms as I think appropriate even without a supersedeas bond, right?

MS. McMILLAN: Are we talking about during the pendency of the appeal or until the second arbitration is completed?

THE COURT: Well, we're talking about the during the pendency of the appeal, but for the moment we're talking only about until this motion gets decided.

MS. McMILLAN: I would agree with your Honor that that's permissible.

THE COURT: OK. Do you consent to the stay being in effect until I decide this motion?

MS. McMILLAN: Based on what's transpired here today, we will consent to that.

THE COURT: OK. You've received the papers, right, Ms. McMillan?

MS. McMILLAN: I have as of this afternoon, your Honor. I'm sorry. They did come email this morning, but I received a hard copy this afternoon.

THE COURT: You're both on the electronic case file, right?

MS. McMILLAN: Yes, your Honor.

MR. JEMISON: Yes, your Honor.

THE COURT: I have signed the TRO and the order to show cause. I have made the order to show cause returnable on July 22 at 4:00 p.m. Answering papers are due July 15. Reply papers July 18.

If you would like me to take the motion on submission on July 22, I would probably be happy to do so, but you need to get to me the week before. So my law clerk will make a copy of the order to show cause that I have signed, and you can pick it up from my chambers in about ten minutes. And I think that takes care of that.

So, unless there's anything else, we are concluded for this afternoon.

MR. JEMISON: Your Honor, can I just -- can you clarify just so I make sure I understand what you meant when you said take it on submission on the 22nd?

THE COURT: That means nobody has to show up if I take it on submission.

MR. JEMISON: That is what I thought you meant. I wanted to make sure I understood you correctly.

THE COURT: Yes. And I think in your briefing you need to address the Rule 62 point that I raised with counsel. I think you need to address the question of whether I have any subject matter jurisdiction to deal with the dispute over the

stay agreement at all in light of the lack of a reservation of jurisdiction and the *Kokkonen* case in the Supreme Court and such others matters as you think appropriate.

I think what you may have here as far as the stay agreement is concerned is a contract dispute that's not within my jurisdiction because you've got aliens on both sides and therefore you don't have diversity. But I leave that to you folks. Thank you. Have a good weekend.

MS. McMILLAN: Thank you again, your Honor, for your patience in my travel time today.

THE COURT: Not at all.

(Adjourned)